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Supreme Court of the United States

OCTOBER TERM, 1958

No. 324

GENERAL MOTORS CORPORATION, PETITIONER,

vs.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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August, 1958

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IN THE

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No.

GENERAL MOTORS CORPORATION, FRIGIDAIRE DIVISION,
Petitioner,

v.

THE UNITED STATES, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Court of Claims in the above-entitled case.

OPINIONS BELOW

The opinions in the Court of Claims (Appendix, pp. 1a-8a) are reported at 147 F. Supp. 739.

JURISDICTION

The judgment of the Court of Claims was entered on July 16, 1958 (Appendix, p. 4a). The jurisdiction of this Court is invoked under 28 U.S.C. §1255 (1).

QUESTIONS PRESENTED

Does the Manufacturer's Excise Tax imposed upon the sale of refrigerators and related products apply to charges made by a manufacturer for agreements which obligate it to repair or replace the cooling units in its products should such units wear out during the second through the fifth year of use?[1]

STATUTES INVOLVED

Internal Revenue Code of 1939:

Section 3405. TAX ON MECHANICAL REFRIGERATORS, QUICK-FREEZE UNITS, AND SELF-CONTAINED AIR-CONDITIONING UNITS.

"There shall be imposed on the following articles (including in each case parts or accessories therefor sold on or in connection with the sale thereof) sold by the manufacturer, producer, or importer a tax equivalent to 10 per centum of the price for which so sold:

"(a) Refrigerators and quick-freeze units. Household type refrigerators (for single or multiple cabinet installations) having, or being primarily designed for use with, a mechanical refrigerating unit operated by electricity, gas, kerosene, or gasoline; household type units for the quick freezing or frozen storage of foods, operated by electricity, gas, kerosene, or gasoline; combi-

[1] There is also presented the question whether the expense of making good on a manufacturer's warranty constitutes a discount, rebate, or allowance for excise tax purposes. This same question is presented in the petition in No. 144, Ford Motor Co. v. United States. In addition, if the main question is answered in the affirmative, a further question would be presented: Do expenditures incurred by manufacturers in carrying out repair and service agreements constitute a discount, rebate, or allowance for excise tax purposes?

nations of such household type refrigerators and units."

* * * * *

"(c) Air conditioners. Self contained air conditioning units." 53 Stat. 412.

Section 3406. EXCISE TAXES IMPOSED BY THE REVENUE ACT OF 1941.

"(a) Imposition. There shall be imposed on the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to the rate, on the price for which sold, set forth in the following paragraphs (including in each case parts or accessories of such articles sold on or in connection therewith, or with the sale thereof):

* * * * *

"(3) Electric, gas, and oil appliances . . . electric, gas, or oil water heaters; . . . 10 per centum.

Section 3441. SALE PRICE.

"(a) In determining for the purposes of this chapter, the price for which an article is sold, there shall be included any charge for coverings and containers of whatever nature, and any charge incident to placing the article in condition packed ready for shipment, but there shall be excluded the amount of tax imposed by this chapter, whether or not stated as a separate charge. A transportation, delivery, insurance, installation, or other charge (not required by the foregoing sentence to be included) shall be excluded from the price only if the amount thereof is established, to the satisfaction of the Commissioner, in accordance with the regulations." 53 Stat. 416.

Section 3443. CREDITS AND REFUNDS.

"(a) A credit against tax under this chapter, or a refund, may be allowed or made—

* * * * *

"(2) to any person who has paid tax under this chapter with respect to an article, when the

price on which the tax was based is readjusted by reason of return or repossession of the article or a covering or container, or by a bona fide discount, rebate, or allowance; in the amount of that part of the tax proportionate to the part of the price which is refunded or credited."

STATEMENT

Petitioner manufactures and sells household refrigerators and related products that are subject to the Manufacturer's Excise Tax. Since the 1920's petitioner's sales price has included a charge for a one-year warranty that constitutes a recognition by petitioner of its obligation as a manufacturer to provide a product free from defects attributable to workmanship and material and other manufacturing errors. This one-year warranty thus discharges the legal liability of petitioner as a manufacturer.

In addition, petitioner sells a repair contract, called a "Protection Plan," which obligates it to repair or replace the sealed cooling unit in its refrigerators should the unit wear out after the one-year warranty has expired and before the end of the fifth year following delivery to the initial purchaser.[2] Petitioner commenced to sell such contracts in 1933 and offered them to the purchasers of its products on an optional basis

[2] "Five-Year Protection Plan—We Warrant every new 1936 Frigidaire Household Sealed-In Mechanical Unit to be free from defects in material and workmanship under normal use and service, and we will, within five years from date of delivery to the original purchaser, replace without any cost to the customer, any Sealed-In Mechanical Unit which our examination shall disclose to our satisfaction to be thus defective, provided, however, that by so doing we shall not be obligated to replace the complete refrigerator. The foregoing applies only to the Sealed-In Mechanical Unit under conditions specified herein, and does not apply to any other parts of the Frigidaire equipment mentioned hereinafter."

until 1936. Since then petitioner has required that repair contracts be purchased for refrigerators and other products purchased for individual household use.

Petitioner made a charge of $5 for each repair contract and this case involves claims for refund of Manufacturer's Excise Taxes paid on such charges. The question whether the Manufacturer's Excise Tax is applicable to this charge has been litigated in three different cases before the Court of Claims. All three cases have involved the same law and the same contract, yet three different and inconsistent answers have been given.

In the first case, which covered charges made from May 10, 1937, through December 31, 1941, *General Motors* v. *United States*, 121 F. Supp. 932, certiorari denied 348 U.S. 942, the Court of Claims held that although the charges made for the repair agreements were subject to the Manufacturer's Excise Tax, the expenses incurred in carrying out such agreements were "allowances" within the meaning of Section 3443(a)(2) of the 1939 Code and predecessor sections of the Revenue Acts, and thus petitioner was entitled to an appropriate refund. In the second case, *General Motors* v. *United States*, 146 F. Supp. 220, covering the period from January 1, 1942, through December 31, 1944, a similar result was reached when the court below first considered the case.

In the third case, the review of which this petition seeks, a similar refund was sought with respect to the period January 1, 1945, through August 31, 1951. Petitioner requested summary judgment which was denied on the ground that the court has been "wrong in holding that [petitioner] was entitled to [a refund]

as an 'allowance.'". *General Motors* v. *United States*, 147 F. Supp. 739. Instead, the court concluded that a refund was due for the principal reason advanced by petitioner, and rejected by the court, in the first two cases—namely that the charge made for the repair agreement was not subject to the Manufacturer's Excise Tax "because it was not part of the sales price, but was an extra charge for an agreement to keep certain parts of the refrigerator in repair beyond the period of the usual manufacturer's warranty." The court thereupon withdrew the opinion it had rendered in petitioner's second case and entered judgment for petitioner on the ground that the charge for the repair agreement was not subject to the Manufacturer's Excise Tax.

In its decision in petitioner's third case, the court below held that the charge for the repair agreement should be excluded from the tax base to the extent that it was reasonable in amount, and further held that the charge should "bear a close relationship to the actual cost of rendering the service. When so limited . . . the opportunity for evasion of the excise tax practically disappears." The case was referred to a commissioner of the court to take evidence as to the reasonableness of the $5 charge made by petitioner. Subsequently, the court also directed the commissioner to take evidence on the question of whether such repair agreements were customary in the trade during the years involved.

On the evidence submitted, the commissioner found that petitioner's charge for the repair agreements was reasonably related to the costs of making repairs and was reasonable in amount, and that such repair agreements were customary in the trade.

The Court of Claims, on July 16, 1958, adopted the commissioner's findings and filed the opinion and judgment here sought to be reviewed. In that opinion, the court reversed its field once again and held that the repair agreements in question were "a taxable part of the purchase price of the article sold" because other manufacturers in the trade sold similar repair agreements. Judge Whitaker, dissenting, adhered to the position he had taken in the first decision and consistently maintained throughout this litigation —that a charge for a repair agreement is not subject to the Manufacturer's Excise Tax.

REASONS FOR GRANTING THE WRIT

The Court of Claims has erroneously decided an important question of federal excise tax law and has left the question in such a state of confusion that review by this Court is necessary. Absent an exercise of this Court's certiorari jurisdiction to make clear the application of the questioned statutory provisions, the inconsistent and confused positions taken by the court below will render it impossible to predict the excise tax consequences of the repair and replacement services conducted by much of the manufacturing industry.

Under Section 3405 of the Internal Revenue Code of 1939,[3] an excise tax is imposed upon the sale by manufacturers of "refrigerators" and "parts or accessories therefor," which excise, so far as here relevant, is a fixed percentage of "the price for which [such appliances are] so sold." A charge by a manu-

[3] The questioned excise tax provisions of the 1939 Code were reenacted without significant change as Sections 4111 and 6416 of the Internal Revenue Code of 1954.

facturer for a service contract is not subject to excise tax if it is not comprehended by the above language of Section 3405, or if it is an "other charge" which is specifically excluded by Section 3441(a). In the event the repair charge is taxed as part of "the price" of the refrigerator, the cost of repairs or replacements under the service contract should constitute an "allowance" under Section 3443(a)(2) which permits a credit or refund of the excise paid if the "price" of a taxable article is "readjusted" "by a bona fide discount, rebate or allowance."

In short, a charge for a service agreement should be excluded from tax because it is not part of the price of the article or because it is an "other charge" that is specifically excluded; if it is included as part of the price, the actual cost of making repairs under the agreement should be allowed as an adjustment to the sale price.

Though the legal questions thus presented are precise and narrow, their resolution by the court below has been inconsistent, halting and confused. In three different cases the Court of Claims has considered the separate charge for and the expense incurred under

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[4] The Court of Claims has held that expenditures incurred in fulfilling a manufacturer's warranty and expenditures incurred in carrying out repair agreements do not come within Section 3443(a)(2). The first of these conclusions was reached by the court both in this case and in Ford Motor Company v. United States, 156 F. Supp. 554. As noted above, there is pending before this Court a petition for certiorari in the Ford case, No. 144, October Term, 1958. The Ford case does not involve repair agreements for which an extra charge is made. However, since it does present an important aspect of the allowance question the Court may wish to consider the petition in the Ford case together with the petition in this case.

precisely the same repair agreement. The first time it found that a tax was properly imposed on the charge, but recognized that the expense of providing repair services under the agreement constituted an allowance. The second time it found that no tax should be imposed upon the charge for the repair agreement to the extent it was reasonable in amount; and the third time it imposed a tax on the charge and refused to recognize that the expense of fulfilling the repair agreement constituted an allowance. Petitioner has thus recovered in one case on one theory; in the second case, on a different theory; and in the third case, has been denied any recovery in a decision which rejects both of the theories previously embraced by the court. The third holding, to which this petition is directed, rests largely, if not entirely, upon the significance which the court attached to the fact that other manufacturers in the trade entered into service and repair arrangements substantially similar to those of petitioner.

Refrigerator manufacturers do contract to provide services of the kind covered by the service agreements which petitioner sold. But nothing is said or implied in the governing statute which would impose a tax on the price of "service" sold in connection with refrigerators. Nor is there anything in the legislative history that supports such a result. The plain meaning of the statute permits the imposition of the tax only upon the price of the "article" sold. Thus, the only rational basis for the imposition of the excise here would be a finding that the sale of a refrigerator obligates a manufacturer to service it for a period of five years so that a charge for an agreement to provide such service is merely part of the price of the "article."

The record and conclusions of the court below establish, however, that repair is not part of the obligation imposed upon a manufacturer through the sale of a refrigerator. Only the terms of a specific agreement such as petitioner made, would impose any obligation upon a manufacturer to repair a refrigerator two to five years after it had been put to use. That manufacturers generally have entered into repair agreements comparable to those sold by petitioner cannot in any way affect the service character of such agreements or indicate that Congress intended to tax them simply because they were entered into by manufacturers at the time the refrigerators were sold.

The fact that manufacturers generally contract to provide repair services under agreements similar to those sold by plaintiff establishes only that the question in this case involves substantial amounts of money. It means that other manufacturers may have similar claims for refund and that excise tax collections may be less if the governing statute is not extended to cover the sale of repair services by manufacturers. Such considerations, however, are quite irrelevant to the question of statutory construction presented in this case. *Cf. Dalehite* v. *United States*, 346 U.S. 15, 60. If such services are to be subject to the excise tax, it is for Congress to so declare. And in the absence of such a declaration it is not open to the courts to amend the statute to avoid a possible revenue loss.

The court below may have confused a repair agreement with a warranty that a product is free from defects, which is an integral feature of any manufactured product. In an earlier decision in this case the court referred to a warranty that an article

when sold is in good working condition and free from defects, and stated that the sales price includes such a warranty. More recently in the *Ford Motor* case, *supra*, the court again expressed the view that a warranty that an article is free from defects is an integral part of the product. It would seem that the portion of the price of a product attributable to such a warranty would be subject to the excise tax because the purchaser would be thus receiving only what he had a right to receive—a refrigerator free from defects in workmanship and material. In its final opinion, however, the court ignored its previous acknowledgement that the one-year warranty satisfied the manufacturer's obligation to sell a sound refrigerator, and taxed the charge for a repair agreement as if it were no more than a warranty against defects of workmanship and material.

Repair agreements are something quite different—as the owner of an appliance such as a television set will at once know. Assuming perfect workmanship and material, ordinary wear and tear will demand repair and replacement of parts and components. As a matter of customer contentment and product prestige nearly every appliance manufacturer will either undertake to provide repair service for at least the more complicated components of his product or recommend to the customer that all specialized work on the appliance be done by "authorized dealers."[5] To

[5] The court below found that the repair services performed by petitioner under the agreements in question were "attributable to certain types of wear and tear" caused by the use of the refrigerators or to other factors beyond petitioner's control and not to defects in workmanship and material or other manufacturing

the extent the former procedure has been adopted by petitioner with respect to its refrigerators, it sells service contracts obligating it to make any necessary repairs on the sealed cooling unit for four years after the one-year warranty has expired. The question would not be different were the period ten years and the product a televison picture tube.

Since the legal obligation of a manufacturer extends only to defects of workmanship and material in the product at the time of sale,[8] a manufacturer need not undertake, for any price, to repair his product after it has been in use for a period of years. Thus, as found by the court below, petitioner did not sell repair agreements for a substantial number of refrigerators sold to multiple unit purchasers for other than household use. (Findings 26 and 88, Appendix pp. 15a, 16a, 38a). Where such repair contracts were sold, however, the sale was of a separate service quite apart from the refrigerator and the legal obligations which its price included. As a matter of statutory construction there is no basis for holding that the repair agreements were

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errors. The court noted that an example of the cause of such wear and tear would be the "operation of the unit under low voltage." In this connection, the court also found that since the early 1930's repair agreements to provide service following the expiration of the manufacturer's one-year warranty have been widely sold in metropolitan areas by independent service and repair companies which neither manufacture nor sell the refrigerators covered by their repair agreements. (Findings 57, 61, 63, App. pp. 29a, 31a). If the court's reasoning be valid, the charge made by such non-manufacturing repair companies should also be subject to the excise tax.

[8] Section 15(2), Uniform Sales Act, (1950 ed.); 1 Williston, Sales § 232 (1948 ed.).

a part of the article and that the price of the service undertaking was a part of the price of the article.[7]

Should the decision below be allowed to stand, a statute which imposes a tax on the price for which selected manufactured products are sold will have been used to exact a tax upon amounts received for the performance of repair services.

Respondent argued below that should the separate service charge be excluded from the tax base, an easy device for reducing the proper amount of excise would be created. This argument involves a padding of the price of the service agreement with a corresponding decrease in the "price" of the refrigerator. The court

[7] Other Federal agencies that have had occasion to examine into the characteristics of repair contracts have concluded that they do not represent a manufacturer's obligation but are separate service agreements.

(a) The NRA Code, which was in effect during the period these contracts were developed, specified the standard one-year warranty as the required obligation of a manufacturer. It recognized the existence of repair and replacement contracts, but excluded them from the price of a refrigerator and provided that they should be the subject of individual arrangements.

(b) The specifications for refrigerators which the National Bureau of Standards, in conjunction with other agencies, developed for the guidance of Federal Purchasing agents from 1941 through 1956 prescribed a one-year warranty but made no mention of repair contracts on sealed units. Clearly such a contract was regarded as an extra and not as an integral part of a refrigerator.

(c) Both the Office of Price Administration during World War II and the Office of Price Stabilization during the Korean War were required to consider the proper pricing of refrigerators. Both viewed the one-year warranty as an integral feature of a refrigerator and allowed the expenses attributable to its fulfillment to be considered in pricing the product. Neither regarded the repair agreements as a part of the refrigerator and both regulated its pricing, not as part of the product, but as a separate service.

below—in its intermediate opinion—recognized the force of this argument and provided that no charge should be excluded from tax unless it was established to be reasonable in amount. Insofar as petitioner is concerned, the court found the argument to be without merit since the entire charge was reasonably related to the services performed.[8] But aside from petitioner's case, clear statutory language must be respected even though in some instances the language used by Congress might create administrative problems. If the language needs correcting, Congress must do it.[9]

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[8] The following facts were found by the Court below and are set forth in Findings 72 and 73 (App. p. 33a):

When the repair agreement program was first instituted in 1936 the charge was set at $5.00 (except as to self-contained air conditioners). This original charge was based on petitioner's determination that the probable cost for the repair of a single unit would be approximately $25.00 and that not more than 20 percent of the units sold would become inoperative during the four-year period of the agreement. On that basis it was determined that a charge of $5.00 paid by each purchaser would meet the anticipated costs. From 1936 to the present time, however, petitioner has annually reviewed and re-examined its charge for the agreements by considering past experience, and making the best forecast possible for a future period as to the number of units which might require repairs, the nature of the repairs, and the prospective cost of the repairs. At all times the charge arrived at was intended to meet estimated expenses with a reasonable margin for possible increases in cost and errors in forecasting. Thus, the original $5.00 charge has not been arbitrarily maintained from the inception of the program through the period of this claim but has been annually reviewed and re-examined. The court thus found that the $5 fee "was a reasonable charge." Finding 94, App. p. 41a.

[9] On January 9, 1956, after the Court of Claims first opinion, 121 F. Supp. 932, the Treasury Department and the Joint Committee on Internal Revenue Taxation submitted a Report to the House Subcommittee on Excise Tax Technical and Administrative Problems. In that report, Congress was strongly urged to revise

Since the decision of the Court of Claims is entirely without precedent and raises serious and complicated excise problems for a broad segment of the nation's industry, the absence of conflicting decisions in other tribunals should not deter the Court from issuing the writ. If conflict in this area be needed, however, the doctrine of "intra circuit conflict"[10] warrants an exercise of this Court's certiorari jurisdiction. In accordance with that doctrine, the Court exercises jurisdiction to resolve a question that has been inconsistently decided in but one of the eleven circuits. Certainly the Court is warranted in clarifying the confusion created by this case in view of the fact that the Court of Claims is vested with nationwide jurisdiction in excise tax refund suits, and is the only lower Federal tribunal that enjoys such jurisdiction.

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the relevant provisions of the 1954 Code to preclude the "allowance" of expenses incurred in the repair of a refrigerator under a warranty, and to provide that the excise tax would apply "where the taxpayer makes a separate compulsory charge" for a repair contract. Thus, the Treasury Department recommended that "the definition of sale price for purposes of the retailers' and manufacturers' taxes be amended to include specifically compulsory charges for the warranty of the articles." It also asserted that any report accompanying such recommended legislation "should indicate that these amendments are declaratory of the intent of Congress as originally expressed in enacting section 6416(b)(1) of the 1954 Code, and the corresponding provisions of the 1939 Code and prior laws." Despite these recommendations, Congress refused to amend the provisions in question. This refusal is the more significant since in the subsequent Forand Bill (H.R. 7125, passed by both Houses of Congress and now awaiting the approval of the President), though Congress made major revision in the excise tax provisions of the 1954 Code, no change was made in the "definition of sale price" or in the "allowance" provision.

[10] *Dickenson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 508; *Maggio* v. *Zeitz*, 333 U.S. 56; and *John Hancock Mutual Life Insurance Co.* v. *Bartels*, 308 U.S. 180.

CONCLUSION

As established by the findings of fact below, petitioner, for sound business reasons and not as part of its manufacturer's obligation, charged the purchasers of its refrigerators a separate and reasonable fee for long term repair contracts covering the cooling units of such refrigerators. The application of the Manufacturer's Excise Tax to this fee results in the collection of an excise on repair service charges—a result achieved only by a clear extension of the governing statute.

The Court of Claims has thus erroneously decided a question of substantial importance which, for the reasons stated, should be reviewed by this Court. Accordingly, the petition for a write of certiorari should be granted.

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